# ERISA PREEMPTION and STATE HEALTH CARE REFORM:
## THE UNSTOPPABLE FORCE MEETS THE IMMOVABLE OBJECT

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# RELATE TO CLAUSE

- " … the provisions of this subchapter shall supersede <u>**any and all State laws insofar as they may now or hereafter relate to any employee benefit plan**</u> described in section 4(a) and not exempt under section 4(b)."

# SAVINGS CLAUSE

- (A) "Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which **regulates insurance**, banking, or securities."

# THE DEEMER CLAUSE

- (B) "Neither an employee benefit plan, . . . nor any trust established under such a plan, **<u>shall be deemed to be an insurance company</u>** or other insurer, bank, trust company, or investment company … "

# A STATE LAW IS MORE LIKELY TO AVOID PREEMPTION IF

- Exercises Traditional **state police powers**
  - Regulation of Health Care.
- One of general application.
- A tax.
- Congress did not intend to preempt.

# A STATE LAW IS MOST LIKELY PREEMPTED IF

- Imposes requirements on plans.
- Deals with plan administration.
- Provides for alternate enforcement mechanisms.
- Deals with plan structure.

# INSURANCE SAVINGS CLAUSE

- A state can regulate insurers and insurance products, and those state laws will not be preempted.

- If a plan purchases an insurance product, a state may regulate the product but not the plan.

- Such regulation results in different state laws but Congress specifically permitted.

# MARYLAND FAIR SHARE ACT

- Imposed a payroll tax on large employers (10,000 or more employees in Maryland).
- Authorized a dollar-for-dollar credit against the tax for amounts covered employers spend on "health insurance costs".
- Taxes collected by Secretary of Labor, Licensing and Regulation.
  - Used to support Maryland's Medicaid.

# MARYLAND FAIR SHARE ACT DECISION

- Maryland Act directly regulates plans because no “meaningful alternatives”.
- Since the only rational choice employers have is to meet the minimum spending threshold, the Maryland Act effectively mandates employers to provide a certain level of benefits; therefore is preempted because of “connection with” plans.
- Vast majority of employer spending through ERISA plans and even if employer were to use non-ERISA spending alternatives, it would have to coordinate with ERISA plans.

# OTHER PREEMPTION CHALLENGES

- Providing participants the right to assign their benefits to any service provider, whether or not they are in network.
- Regulation of Pharmacy Benefit Managers.
- Prompt pay laws.
- State medical licensing board’s disciplinary inquiry into a physician’s judgment.